In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-560

FIRST NATIONAL BANK OF FAIRBANKS, PETITIONER

v.

WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY OF THE UNITED STATES

AND

THE FIRST NATIONAL BANK OF ANCHORAGE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE COMPTROLLER OF THE CURRENCY IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 465 F. 2d 586. The opinion of the district court (Pet. App. B) is reported at 326 F. Supp. 541.

JURISDICTION

The judgment of the court of appeals was entered on June 7, 1972, and a timely petition for rehearing was

denied on July 12, 1972. The petition for a writ of certiorari was filed on October 6, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Comptroller of the Currency must deny the application of a national bank to establish a branch because a state banking official testifies hypothetically that he would not approve such an application by a state bank.

2. Whether the Comptroller took reasonable steps to insure that the name of the new branch bank would not be confused in the public mind with that of existing banks in the community.

3. Whether the Comptroller violated administrative due process by not issuing a written opinion when he approved the instant branch banking application.

STATEMENT

This suit was brought in the district court by First National Bank of Fairbanks ("FNB Fairbanks") to reverse the decision of the Comptroller of the Currency authorizing the First National Bank of Anchorage ("FNB Anchorage") to establish a branch in Fairbanks, Alaska. FNB Anchorage is the second largest bank in Alaska. Its chief competitor is Alaska's largest bank, the National Bank of Alaska, which opened a Fairbanks branch in December 1969 (Pet. App. A24, A28).

After FNB Anchorage's application was submitted, the Comptroller, in accordance with his customary practice, notified competing banks and the state bank-

ing officials of the application and solicited their written and oral comments. After written submissions from most protestants had been received, the Regional Comptroller held a hearing at which witnesses representing both FNB Fairbanks and the State of Alaska testified in opposition to the application (Pet. App. A5-A7).

Acting on divided recommendations of his staff, the Comptroller initially disapproved the application. However, when FNB Anchorage subsequently requested reconsideration, the Regional Comptroller made a new investigation and recommended that the application be approved. The Comptroller's Washington staff also unanimously recommended approval. Upon the basis of these unanimous recommendations, the Comptroller reversed his original decision and approved the application (Pet. App. A8-A10). This approval was explicitly conditioned upon the designation of a distinctive name for the new branch to eliminate any possible confusion of names of the two "First National" banks (Pet. App. A10).

FNB Fairbanks thereupon commenced this litigation. It alleged that the Comptroller's decision was arbitrary and unreasonable, because the advice of the State Director of Banking that the Fairbanks area already had sufficient banking facilities was disregarded and because the name to be used is too similar to FNB Fairbanks. FNB Fairbanks also asserted that it was denied administrative due process because it did not have a chance to cross-examine witnesses from FNB Anchorage at the investigative hearing. The dis-

trict court rejected these arguments, and the court of appeals affirmed.

ARGUMENT

Petitioner does not contend that the record fails to support the Comptroller's decision. It argues rather that the Comptroller was required to disapprove the application because a state banking official stated that, if a state-chartered bank filed a similar application to open a branch in Fairbanks, he would disapprove it. Petitioner also argues that "the common law of trade names and unfair competition" bars the Comptroller from certificating more than one "First National" bank in the Fairbanks area, and that it was denied administrative due process because the Comptroller did not issue a written opinion explaining his decision. These arguments are without merit and present no issues warranting review by this Court.

1. The National Bank Act, 12 U.S.C. 36(c), authorizes national banks to establish and operate branches outside their home city with the approval of the Comptroller—

> if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively * * *.

Petitioner argues that this statute compels the Comptroller to defer to the view of the Alaska State Director of Banking that the approval of the branch here in question would be inconsistent with the standards of the Alaska banking statute as he viewed them. Section 415 of the Alaska Banking Code, 6 Alaska Stats.

06.05.415, requires the Department of Banking to issue a certificate of authority to operate a branch bank if, *inter alia*, "the department determines that the addition of the proposed facilities in the community is not detrimental to a sound banking system". The State Director stated that he would disapprove the application because Fairbanks is overbanked and the entry of FNB Anchorage would in his view be detrimental to a sound banking system.

Petitioner argues that the Comptroller is without authority to grant this application over the objections of the State Director. This contention is inconsistent with the National Bank Act, which vests in the federal Comptroller, and not in state officials, the responsibility for passing upon applications to establish branches of national banks (12 U.S.C. 36(c)). It also conflicts with the congressional policy of competitive equality in branching between the state and federal banking systems, as enunciated in *First National Bank of Logan* v. *Walker Bank & Trust Co.*, 385 U.S. 252. Under *Walker Bank*, the Comptroller must apply the standards established by state statutes to applications for branches submitted by national banks; he may, however, approve the establishment of a branch bank without seeking the approval of state officials or being bound by their interpretation of the state statute. See *Union Savings Bank of Patchogue* v. *Saxon*, 335 F. 2d 718 (C.A. D.C.); *Leuthold* v. *Camp*, 273 F.Supp. 695 (D. Mont.), affirmed *per curiam*, 405 F. 2d 499 (C.A. 9); *Rushton* v. *Michigan National Bank*, 298 Mich. 417, 299 N.W. 129.

As explained in the court of appeals' opinion, upon which we rely, to subject the Comptroller's exercise

of discretion in passing on branching applications of national banks to the veto of state banking officials would subordinate the position of national banks and totally undermine the doctrine of competitive equality as enunciated in *Walker Bank* (the Comptroller has no veto over state bank branching applications). The court of appeals correctly rejected such *ad hoc* control by state officials over national bank branching, there is no conflict in decisions,[1] and further review on this point is unwarranted.

2. Petitioner argues that the Comptroller ignored the possibility that there would be confusion in the public mind if two First National banks were permitted to operate in the same area. The Comptroller considered this question, however, and explicitly conditioned his approval of the branch application on FNB Anchorage's undertaking to choose a name which would not be confused in the public mind with FNB Fairbanks. In any event, the narrow question of whether the inhabitants of Fairbanks will be confused by the similarity of names does not warrant review by this Court.

3. Petitioner's third contention is that it was denied administrative due process by the Comptroller's failure to make specific findings or issue a formal opinion on the conformity of his action to the requirements of

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[1] Petitioner relies (Pet. 18-19) upon dictum in *Dickinson* v. *First National Bank in Plant City, Florida*, 400 F. 2d 548 (C.A. 5), that the Comptroller should defer to state officials in interpreting state banking statutes. However, this Court did not adopt that view in affirming the Fifth Circuit's judgment. *First National Bank in Plant City* v. *Dickinson*, 396 U.S. 122, 133-134. Thus the decision in this case is consistent with this Court's decision in *Plant City*.

the Alaska Banking Code. This contention was neither briefed nor argued by petitioner in the lower courts, and the question was first raised by the court of appeals, *sua sponte,* at oral argument. Thereafter, in its opinion, the court briefly adverted to the Comptroller's failure to make a specific finding on the issue of conformity with state law; but the court concluded, after its own "extremely careful" scrutiny of the record, that "there is substantial evidence in this record supporting the conclusion that the 'statute law' of Alaska concerning branch banks has been complied with * * *." The court thus considered itself in a position to review and affirm the Comptroller's action. (Pet. App. A22).

Neither the national banking laws nor the Administrative Procedure Act requires that the Comptroller make contemporaneous findings or issue formal opinions explaining his reasons when he approves or disapproves branching applications. *Sterling National Bank of Davie* v. *Camp,* 431 F. 2d 514, 517 (C.A. 5), certiorari denied, 401 U.S. 925; cf. *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402, 417. As this Court said in *Overton Park,* "the Administrative Procedure Act requirements [5 U.S.C. 553(a)(2), 554(a)] that there be formal findings in certain rulemaking and adjudicatory proceedings do not apply * * * here" (*ibid.*). Those Administrative Procedure Act requirements pertain only to rulemaking and cases of "adjudication required by statute to be determined on the record after opportunity for an agency hearing * * *." 5 U.S.C. 554(a). The provision requiring the Comptroller's approval for branching by a national bank, 12 U.S.C. 36, contains no specification that a hearing

of any sort, let alone the kind of hearing described in Section 554(a), be held by the Comptroller.

In any event, the Comptroller's reasons for approving this application appear in the staff recommendations contained in the lengthy administrative file, which was part of the court record in this case. And, in fact, the courts below viewed the administrative file as sufficient for purposes of reviewing the administrative action, just as other federal courts have reviewed decisions of the Comptroller for arbitrariness on the administrative record as submitted without an opinion by the Comptroller. *E.g., Sterling National Bank of Davie* v. *Camp, supra; Warren Bank* v. *Camp,* 396 F. 2d 52 (C.A. 6); *Webster Groves Trust Co.* v. *Saxon,* 370 F. 2d 381 (C.A. 8). Thus, while a remand for purposes of ascertaining the basis for administrative action may, entirely apart from considerations of administrative due process, be appropriate where necessary to permit effective judicial review, as in *Overton Park,* there is no error in either the administrative or the judicial proceedings when the reviewing court is willing and able to undertake effective judicial review on the record before it.[2]

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[2] There is thus no conflict between the decision in the present case and that of the Fourth Circuit in *Pitts* v. *Camp,* 463 F. 2d 632, in which the government has petitioned for certiorari (No. 72-864), since the remand in *Pitts* turned on the court's inability to provide effective review under the circumstances of that case, a difficulty not present in the instant case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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